SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1379

WALTER HUMPHREY, DONALD V. MALONE, ROBERT KALWAT and MARION A. SACKSTEDER, *Petitioners,*

v.

DEALERS TRANSPORT COMPANY

and

E & L TRANSPORT COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY MEMORANDUM FOR PETITIONERS

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June 13, 1969

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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1. Respondents continue to misstate the essential predicate of this action. They overlook that the employers' misrepresentations to the Union officials formed the basis of the officials' advice, not only to petitioners, but also to their competitors for jobs, Dealer's employees (Pet., pp. 4, 5, 7-8). While petitioners did not rely on that advice (E & L Br., pp. 11-14, 16, 17; Dealers Br., pp. 6-7), *Dealers' employees did,* and so asserted in their complaint in *Humphrey* v. *Moore* (See 375 U.S. 335 at 340; Pet., p. 5).

Nothing in the law of fraud or of contract even remotely suggests that a party is immune for fraudulent misrepresentations which induce one beneficiary (Dealers' employees) to take action detrimental to another (E & L's employees). Certainly, that cannot be the law of Section 301, if the multilateral relationships characteristic of association-wide collective bargaining contracts (Pet., p. 4), are to enjoy the protection of the inherent obligation of good faith and fair dealing. *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 572 (Brennan, J., concurring.). Respondent Dealers simply ignores this historic contractual obligation (Pet., pp. 11-13) in arguing that its misrepresentation to the Union, designed to thwart enforcement of the contract, is only an unfair labor practice (Dealers Br., p. 5).

2. Respondent E & L's defense of the reasoning below (E & L Br. p. 14) that merely because Dealers' employees and E & L's employees were competitors for jobs, it must be assumed that the former would have sued to enjoin the award if the Companies had disclosed all the facts truthfully and fully in response to the Union's inquiry, is both factually and legally unsound. In the first place, the assumption is contrary to common experience. Moreover, here, specifically, full disclosure would not only have destroyed any basis for attack upon the Union but also the predicate for attack on the Joint Committee's authority on the theory that there was no "absorption" (See 375 U.S. at 346; Pet. p. 8). In any event, the assumption is legally untenable because it would immunize fraudulent misrepresentation in breach of contract wherever the employer's object is to advantage one group of employees over a competing group. Finally, even if the assumption were rational, it could not serve, as it did

here, to foreclose plaintiffs from trial on the issue of causation. See, in addition to the cases cited at Pet., pp. 13-17, *Zenith Radio Corp.* v. *Hazeltine Corp.*, 89 S. Ct. 1562, 1576-1577 (May 19, 1969).[1]

3. While respondent Dealers purported to assume a "neutral" position in the *Moore* litigation, it was not a mere *disinterested* stakeholder, as was the carrier in *Chicago, B. & O. R. Co.* v. *Fowler,* 224 Mo. App. 736, 27 S.W. 2d 72 (1930), upon which Dealers exclusively relies (Dealers Br., p. 12). This is shown by Dealers' agreement with E & L that Dealers would retain its own employees (Pet., p. 7). *Fowler* itself recognizes that, in cases like the present, "neutrality" by the obligor is not a defense but a breach of contract. Thus, the decision below is clearly in conflict with settled contract law. (Pet. p. 20).

4. Respondent Dealers also argues, although the courts below did not agree, that petitioners were bound to seek through the grievance procedure recovery of damages resulting from its noncompliance with the arbitration award. But the contract made that award "final and binding" upon all parties. *Humphrey* v. *Moore*, 375 U.S. at 351. Thus, it became the duty of the courts under Section 301 to remedy noncompliance with the award; this was the precise holding in *Drivers Local Union* v. *Riss,* 372 U.S. 517.

Nothing in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, is to the contrary; rather, it is Dealers' position

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[1] "The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed." *Zenith, supra,* at 1577. Similarly, plaintiffs here were entitled to a trial at which the *jury* would have the opportunity to infer from the circumstantial evidence that the necessary causal relationship between defendants' fraud and the injunction in *Moore* existed.

which would destroy the efficacy of the grievance procedure which *Maddox* was designed to foster. For under respondent's approach, the underlying contractual right would never be ripe for judicial enforcement, thereby frustrating the primary objective of Section 301, to promote adherence to "final and binding" contractual obligations by judicial enforcement. Dealers thus contends for "doctrinaire application of the exhaustion rule [which] would defeat the overall purpose of federal labor relations policy" (cf. *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 329-330). Indeed, by subjecting employees to an infinite series of grievance proceedings without ultimate recourse to judicial relief, the argument goes far beyond *Maddox*, raising in acute form the constitutional objections suggested by Mr. Justice Black's dissent in that case.

5. Respondents assert that the courts below properly read *Humphrey* v. *Moore* as exculpating them from the charge of fraudulent misrepresentation. But no such charge was made or litigated there, and the issue was irrelevant because the theory of *that* complaint was that *the Union* was guilty of fraud or unfair dealing by its erroneous assurances to Dealers' employees. Proof that the Union acted upon misinformation supplied by the Company exculpated the Union from *that* charge; but it did not and could not exculpate the Company from the charge, which is the basis of *this* suit, that it fraudulently misled the Union. The District Court's *second*[2] interpretation of *Humphrey* v. *Moore*

[2] The District Court originally correctly rejected the *res judicata* argument (Pet. App., p. 5a).

Since the present plaintiffs were defendants in *Humphrey* v. *Moore*, that suit bars them from asserting only such matters as were compulsory counterclaims. See Rule 13(a) of the Federal